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In The Supreme Court

OF THE

United States

OCTOBER TERM, 2002

MARION REYNOLDS STOGNER
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

BRIEF IN REPLY

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REPLY

The state claims that Petitioner is vested with no fundamental right in this case pursuant to an expired statute of limitations. Even were that true, they can assert no basis for a claimed "retention" of an expired power to prosecute. Indeed, such a proposition is contrary to all accepted views of constitutional government. For if the inalienable rights of life and liberty are vested in the people, and if in limited circumstances the state is permitted to curtail that liberty, when that permission ends, even if by nothing more than an act of legislation, then the state is without the power to act.[1] Thus even if it can be agreed that an accused is not "vested" with a statute of limitations defense, that does not mean that the state has vested itself with the power to revive an expired claim.

The state further argues that this Court must limit its analysis to the Ex Post Facto Clause, as it is the only available remedy to Petitioner's claim. It is without question that a violation of the Constitution can occur under more that one provision or amendment. Nothing in *Graham v. Connor*, 490

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[1] "[The statute of limitation's] terms not only strike down the right of action which the state had acquired by the offence, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect, its language goes deeper than statutes barring civil remedies usually do. They expressly take away the remedy only by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the state has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end." *Hart Moore v. State*, 43 N.J.L. 203 (1881); *see also Grisuold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg J., concurring) (although "... a ... State may ... serve as a laboratory; and try novel social and economic experiments, I do not believe that this includes the power to experiment with the fundamental liberties of citizens ...") *quoting Poeuter v. Texas*, 380U.S. 400, 413 (1965).

U.S. 396 (1989) would require otherwise, and subsequent cases such as *U.S. v. Lanier*, 520 U.S. 259,272 fn 7 (1997) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) have made this clear. Indeed one of the principle cases relied on by Petitioner, *Carmell v. Texas*, 529 U.S. 513, 536-37 (2000), noted that simply because a law might be a bill of attainder did not mean it was not an ex post fact law as well. Quite clearly then if this Court concludes that Petitioner has not shown that this legislation violates the ex post facto clause, then it should be analyzed under substantive due process principles. *See Albright v. Oliver*, 510 U.S. 266 (1994).[2]

ARGUMENT

Petitioner Marion Stogner has the fundamental right to be free from prosecution, twenty-two years after the statute of limitations has run. *See Falter v. United States*, 23 F.2d 420 (2d. Cir. 1928); *State v. Sneed*, 25 Tex.Supp. 66 (1860); *Hart Moore v. State*, 43 N.J.L. 203 (1881); *State v. Cookman*, 127 Or.App. 283 (1994); *State v. Martin*, 138 N.H. 508 (1994.)

Throughout the history[3] of the United States, the various states and federal government have established

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[2] "To be sure, we have held that a criminal rule or procedure that does not contravene one of the more specific guarantees of the Bill of Rights may nonetheless violate the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Albright v. Oliver*, 510 U.S. 266, 282 (1994) (Kennedy J. and Thomas J., concurring.)

[3] The historical practice even at common law in England shows a general repugnance towards retrospective legislation in general. *See Dash v. Van Kleeck*, 7 Johns 477 (1811.) "There has not been, perhaps a distinguished jurist or elementary writer, within the last two centuries, who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with

statutes of limitation for various crimes. Since the country's earliest days the meaning of these statutes has been unambiguous. When the statute of limitation has expired, so too has the cause of action.

So clear has this rule been that throughout the country's history it has only been disputed on rare occasions. Until *Frazer* each such attempt to impose retroactive legislation to expired statute of limitations cases was rejected. *See People v. Frazer*, 21 Cal.4th 737 (1999). A challenge was proffered in 1860 in Texas, and rejected. *See State v. Sneed*, 25 Tex.Supp. 66 (1860) ("The state having neglected to prosecute within the time prescribed for its own action, lost the right to prosecute the suit.") There were similar challenges with similar results in New Jersey in 1881 and in Oregon in 1994. *See Hart Moore v. State*, 43 N.J.L. 203 (1881) ("Until the fixed period has arrived, the statute is a mere regulation of the remedy, and, like other such regulations, subject to legislative control; but afterwards, it is a defence, not of grace, but of right; not contingent, but absolute and vested; and, like other such defences, not to be taken away by legislative enactment.")[4]; *State v. Cookman*,

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caution, distrust or disapprobation." *Dash*, 7 Johns 477 (Kent, Ch., J. 1811.)

[4] Although also cited to support their argument, the opposition conveniently ignores that in 1881 the New Jersey high court struck down the retroactive legislation, and that, in so doing that court rejected the jurisdictional argument cited in their brief. *See Hart Moore v. State*, 43 N.J.L. 203 (1881) ("[I]t would be a strained and unnatural interpretation of our act to say that it simply withholds jurisdiction from the court.. Its language ... does not relate to the courts, but to the person accused. The answer which under it, the defendant must make to an accusation before the tribunal which once had the right to punish him, is, not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that, after inquiry, the court must pronounce judgment of acquittal. And probably no one would contend that

127 Or.App. 283 (1994) ("In short, we cannot accept the proposition that the state has the supernatural power to exhume and revitalize a prosecution that is dead and buried.")

That even our most learned jurists believed it to be unassailable is clear from the writings of Chief Justice John Marshall. *See Adams v. Woods*, 6 U.S. 336 (1805)("This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years ..."); *Pendergast v. United States*, 317 U.S. 412 (1942); *see also Falter v. United States*, 23 F.2d 420 (1928). Case law is replete with examples of citizens forfeiting their Fifth Amendment rights precisely because they could no longer be prosecuted where the statute of limitations applied, and therefore were not subject to incriminating themselves in a criminal prosecution. *See Brown v. Walker*, 161 U.S. 591, 597 (1896); *Hale v. Henkel*, 201 U.S. 43 (1906); *Ex Parte Louis Cohen*, 104 Cal. 524 (1894); *Blackburn v. Superior Court*, 21 Cal.App.4th 414, 428 (1993)[5]. The holdings of these cases are clear and to the point. The existence then of criminal statutes of limitations and their finality is indeed so deeply rooted in our traditions and consciousness as to trigger the relinquishment of other rights routinely afforded to criminal defendants.

Despite the opposition's contention, at no point in our history has the opposite rule been shown to exist. *See*

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after such judgment, any change in the law could legally subject the defendant to a second prosecution.") California courts are in accord.

[5] It is interesting to note that as recently as 1993 California reaffirmed the finality of its statute of limitations relevant to child molest cases, finding that petitioner had not made a sufficient showing that his testimony would incriminate him in a case concerning child molest where the statute of limitations had run.

People v. Frazer, 21 Cal.4th 737 (1999). [6] Indeed in only a limited line of civil cases has the statute of limitations been deemed subject to retroactivity[7], and only where the underlying right was conclusively shown not to have been destroyed. *See Campbell v. Holt*, 6115 U.S. 620 (1885).

In contrast, California's own historical practice reflects the view that the criminal statute of limitations destroys not only a remedy but also the right of action itself. Moreover, by conferring a substantial benefit to the accused this Court must also examine whether this benefit itself can be taken without due process of law. *See Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972)

CONCLUSION

"The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125

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[6] "Today, California becomes the only jurisdiction, state or federal, to permit "revival" prosecutions under an extended statute of limitations enacted after the expiration of the original statute of limitations. All other jurisdictions that have addressed the issue have concluded or assumed that these prosecutions violate article I, section 10, clause 1 of the federal Constitution, which provides that '[n]o state shall pass any ... ex post facto law ...'." *Frazer* at 777 (Kennard J., dissenting) (citations omitted).

[7] The line of Supreme Court cases referred to in the Opposition Brief cited in *Shadborne –Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1073 (1995) are all economic cases and are not statute of limitation cases at all. Nevertheless, even the *Shadborne-Vinton* court acknowledged *Dinh v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992) where the statute of repose had, as has been the case for Petitioner here, created substantive rights that *could not* be legislatively destroyed once vested. *Shadborne-Vinton* at 1077.

(1990) *quoting Daniels v. Williams*, 474 U.S. 327, 331 (1986). This Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *quoting U.S. v. Salerno*, 481 U.S. 739, 750 (1987).

In Petitioner's case, not only has California put a period at the end of the time by which a prosecution could have been instituted, they, in effect, put an exclamation point when they reaffirmed the termination date as codified in Penal Code section 805.5. California has stated in no uncertain terms that their power to prosecute has ended. Simultaneously, they have decided that Petitioner has been conferred thereby a substantial right. His liberty interest is then inviolate.[8] The

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[8] The state would have this Court ignore the history of both California and the United States in this regard. Rather they would equate the Petitioner's clearly defined substantive rights and liberty interest with nothing more than vague economic interest type cases.

However, even if the court were to engage in a balancing test, the result should still favor Petitioner, *Frazer* proffered the following justification for the legislation: the difficulty by alleged victims in remembering the wrongs themselves, and/or the "emotional vulnerability at the hands of the perpetrators." *People v. Frazer*, 21 Cal.4th 737, 773 (1999). Such justifications may well sustain an increase in the limitations period in prospective cases, however this justification ignores that society by its use of statutes of limitations has *already* taken into account that the passage of time will naturally void even sympathetic claims. Indeed, to the extent that some perpetrators of crimes will escape punishment holds true for all crimes subject to a statute of limitations and has *always* been a cost society has been willing to incur in exchange for the benefits of repose. Moreover, because Penal Code section 803(g) is not limited in any fashion to victims who have repressed the wrongs done them, and might therefore claim recent discovery of the harm, or who might otherwise be prevented from pressing the claim by the alleged perpetrator, any person can trigger the provisions of Penal Code section 803(g) at *any* time *they* choose, regardless of their own knowledge or ability to press the claim.

state has retained no power upon which it can infringe Petitioner's liberty interest. "In our society liberty is the norm." *Salerno* at 755.

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated this 16th day of October, 2002

Respectfully submitted,

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